

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RAINBOW BUSINESS SOLUTIONS, doing
business as PRECISION TUNE AUTO
CARE; DIETZ TOWING, INC.; THE
ROSE DRESS, INC.; VOLKER VON
GLASENAPP; JERRY SU; VERENA
BAUMGARTNER; TERRY JORDAN; ERIN
CAMPBELL; and LEWIS BAE,

Plaintiffs,

v.

MERCHANT SERVICES, INC.; NATIONAL
PAYMENT PROCESSING; UNIVERSAL
MERCHANT SERVICES, LLC; UNIVERSAL
CARD, INC.; JASON MOORE; NATHAN
JURCZYK; ROBERT PARISI; ERIC
MADURA; FIONA WALSH; ALICYN ROY;
MBF LEASING, LLC; NORTHERN
FUNDING, LLC; NORTHERN LEASING
SYSTEMS, INC.; JAY COHEN; LEONARD
MEZEI; SARA KRIEGER; SAM BUONO;
and SKS ASSOCIATES, LLC,

Defendants.

No. C 10-1993 CW

ORDER GRANTING IN
PART PLAINTIFFS'
MOTION FOR CLASS
CERTIFICATION
(Docket No. 508)

Plaintiffs Volker von Glasenapp, who was the sole shareholder
of Just Film, Inc. and acquired its assets when it dissolved in
2011; Rainbow Business Solutions, doing business as Precision Tune
Auto Care, and its owner Jerry Su; Verena Baumgartner, doing
business as Burlingame Motors; Dietz Towing, Inc., and its CFO and
Secretary, Terry Jordan; The Rose Dress, Inc., and its owner Lewis
Bae; and Erin Campbell, doing business as Silicon Valley Pet
Clinic, move for class certification, to be appointed as class

1 representatives¹ and for their counsel to be appointed as class
2 counsel. Leasing Defendants² Northern Leasing Systems, Inc.; MBF
3 Leasing, LLC; Northern Funding, LLC; SKS Associates, LLC; Jay
4 Cohen; Sara Krieger; Leonard Mezei; and Sam Buono oppose the
5 motion. Having considered all of the parties' papers³ and oral
6 argument on the motion, the Court grants the motion in part.

7 BACKGROUND

8 Plaintiffs allege that Leasing Defendants acted as part of a
9 conspiracy to defraud Plaintiffs and the putative class members in
10 a scheme involving credit and debit card processing services and
11 equipment. In the currently operative third amended complaint
12 (3AC), Plaintiffs generally explain the alleged fraud as follows.

13 Credit and debit card transactions are processed through
14 financial networks, called interchanges, run by entities like Visa
15 and Mastercard. Banks, as members of these interchanges, can sell
16 card processing services directly to merchants, or indirectly
17

18 ¹ Plaintiff Lewis Bae, the owner of The Rose Dress, died in
19 December 2013. Plaintiffs no longer seek to have him appointed as
20 a class representative.

21 ² An order granting the motion for final approval of the
22 class action settlement with respect to the other remaining
23 Defendants in this case, Merchant Services Defendants, was entered
on December 11, 2013.

24 ³ Leasing Defendants have filed an administrative motion to
25 file under seal certain exhibits to the declaration of Cortes
DeRussy in support of their sur-reply to Plaintiffs' amended
26 motion for class certification. (Docket No. 540). Those exhibits
27 contain lists of Leasing Defendants' customers' names, addresses
and telephone numbers. Good cause appearing, the Court GRANTS
28 Leasing Defendants' motion to file under seal Appendix A to
Exhibit 49 and Exhibit 51 to the DeRussy declaration.

1 through companies and individuals known as Independent Sales
2 Organizations and Merchant Service Providers (ISOs/MSPs). 3AC
3 ¶¶ 65-67. These ISOs/MSPs must be licensed and registered with
4 both Visa and Mastercard, as well as with a bank or a bank-
5 approved processing entity, called a processor. Id.

6 Merchants pay a fee for each credit and debit card
7 transaction. Id. at ¶ 68. The fee is "shared among (1) the bank
8 that issued the credit or debit card to the customer, (2) the
9 interchange, (3) the bank through whom the merchant is accepting
10 the card, (4) the ISO/MSP that solicited the merchant and/or
11 provides customer service to the merchant (if any) and (5) the
12 third party-processor (if any)." Id. Merchants may also be
13 required to pay for credit and debit card processing equipment,
14 such as card terminals. Id. at ¶ 69.

15 Plaintiffs allege that Leasing Defendants conspired with
16 Merchant Services Defendants, a group of ISO/MSPs, to market
17 fraudulent equipment leases and credit card processing services to
18 merchants. Id. at ¶ 71. Plaintiffs allege that Merchant Services
19 Defendants seek out merchants who wish to accept credit and debit
20 cards and induce them "through a series of deceitful
21 misrepresentations and forged documents" to enroll in fraudulent
22 equipment leases. Id. at ¶ 72. Plaintiffs assert that the high
23 cost of these leases does not pay for the equipment. Instead,
24 Plaintiffs allege that most of the money goes to commissions to
25 Merchant Services Defendants for securing the leases and profits
26 for Leasing Defendants. Id. at ¶¶ 71-72.

1 Plaintiffs allege that Leasing Defendants assist Merchant
2 Services Defendants in inducing merchants to accept the expensive
3 leases by

4 (1) using a contract that appears to be one-page in
5 length, with all signatures on the first page, when in
6 fact there are three subsequent pages not shown to the
7 merchant; (2) failing to engage in effective
8 verification procedures to ensure that the merchant
9 knowingly signed the lease; (3) rejecting many claims by
10 merchants of fraudulent inducement, regardless of the
11 facts presented; (4) hiding their identities from
12 merchants; and (5) engaging in abusive tactics to
13 collect on the amounts purportedly owed on the leases,
14 including aggressively monitoring consumer credit
15 report, making false reports to credit bureaus, and
16 filing unsupportable collection actions in foreign
17 forums.

18 Id. at ¶ 73.

19 In addition, Plaintiffs allege that, while Leasing Defendants
20 contract with hundreds of ISO/MSPs, these fraudulent practices
21 exist only in the contracts marketed by Merchant Services
22 Defendants in this case. Plaintiffs further allege that, in 2011,
23 Leasing Defendants conspired with one another to defraud former
24 lessees by collecting purported taxes that are not actually due or
25 paid to any taxing authority. Id. at ¶¶ 1, 49. Plaintiffs allege
26 that Leasing Defendants conducted a faulty simulation to determine
27 how much to charge those former lessees and compiled the results
28 on a spreadsheet referred to as Schedule 1. When attempting to
collect those taxes, often long after the leases expired, Leasing
Defendants charged merchants administrative fees allegedly not
authorized by their leases. Id. at ¶ 80. Leasing Defendants
sometimes collected these taxes and fees by abusing Automated
Clearing House (ACH) authorizations to make withdrawals from
merchants' bank accounts. Id. Finally, Plaintiffs allege that

1 Leasing Defendants have created a network of shell companies that
 2 "ensures that their unlawful acts remain hidden and that victims
 3 and the courts are unable to identify the responsible party." Id.
 4 at ¶ 82. Plaintiffs allege that Leasing Defendants are not
 5 separate entities, but alter egos of each other. Id. at ¶ 83.

6 Plaintiffs allege that they meet the requirements for class
 7 certification with respect to a class defined as:

8 All persons and businesses who, from March 26, 2006 to
 9 the present were bound by contracts or leases for
 10 merchant card services and/or related equipment with any
 11 of the Defendants, or signed personal guarantees for
 12 such contracts, or against whom Defendants attempted to
 enforce such contracts or leases, attempted to collect
 monies allegedly owed under such contracts or leases, or
 reported to credit agencies that monies were due under
 such contracts or leases.

13 3AC ¶ 657. Plaintiffs seek certification of five subclasses:

14 (1) the Excessive Lease Amount Class, which is defined as:

15 All persons and businesses who, from March 26, 2006 to
 16 the present, were enrolled by the Merchant Services
 17 Defendants in credit card processing services and
 leases, and whose monthly lease amounts exceeded
 Northern Leasing's standard rate caps.

18 Am. Not. of Ps' Am. Mot. for Class Cert. at 1 n.1.

19 (2) the SKS Post-Lease Expiration Class, which is defined as:

20 "All persons and businesses whose lease numbers appeared on
 21 Schedule 1." Ps' Am. Mot. for Class Cert. at x.

22 (3) the Property Tax Fee Non-Disclosure Class, which is
 23 defined as:

24 All persons and businesses whose Equipment Finance Lease
 25 did not disclose "an administrative tax processing fee
 26 in the amount of \$25" but who paid a \$25 property tax
 administrative fee to any Leasing Defendant from March
 26, 2006 to the present.

27 Id.

(4) the Property Tax Equipment Cost Basis Class, which is defined as: "All persons and businesses who from March 26, 2006 to the present paid any Leasing Defendants property taxes based on a cost greater than the 'equipment cost.'" Id.

(5) the Credit Monitoring Class, which is defined as:

All persons who on or after March 26, 2008, had their consumer credit reports inspected, viewed, monitored, or otherwise retrieved from a consumer credit reporting agency by any of the Leasing Defendants in connection with an attempt to collect amounts due on a lease whose monthly amount exceeds Northern Leasing's standard rate caps

Am. Not. of Ps' Am. Mot. for Class Cert. at 1 n.2.

LEGAL STANDARD

Plaintiffs seeking to represent a class must satisfy the threshold requirements of Rule 23(a) as well as the requirements for certification under one of the subsections of Rule 23(b). Rule 23(a) provides that a case is appropriate for certification as a class action if the class is so numerous that joinder of all members is impracticable; there are questions of law or fact common to the class; the claims or defenses of the representative parties are typical of the claims or defenses of the class; and the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a).

Plaintiffs must also establish that one of the subsections of Rule 23(b) is met. In the instant case, Plaintiffs seek certification under subsection (b)(3).

Rule 23(b)(3) permits certification where common questions of law and fact "predominate over any questions affecting only individual members" and class resolution is "superior to other available methods for the fair and efficient adjudication of the

1 controversy." Fed. R. Civ. P. 23(b)(3). These requirements are
2 intended "to cover cases 'in which a class action would achieve
3 economies of time, effort, and expense . . . without sacrificing
4 procedural fairness or bringing about other undesirable results.'" Amchem Prods. v. Windsor, 521 U.S. 591, 615 (1997) (quoting Fed.
5 R. Civ. P. 23(b)(3) Adv. Comm. Notes to 1966 Amendment).

6
7 Regardless of what type of class the plaintiff seeks to
8 certify, it must demonstrate that each element of Rule 23 is
9 satisfied; a district court may certify a class only if it
10 determines that the plaintiff has borne this burden. Gen. Tel.
11 Co. of Sw. v. Falcon, 457 U.S. 147, 158-61 (1982); Doninger v.
12 Pac. Nw. Bell, Inc., 564 F.2d 1304, 1308 (9th Cir. 1977). In
13 general, the court must take the substantive allegations of the
14 complaint as true. Blackie v. Barrack, 524 F.2d 891, 901 (9th
15 Cir. 1975). However, the court must conduct a "'rigorous
16 analysis,'" which may require it "'to probe behind the pleadings
17 before coming to rest on the certification question.'" Wal-Mart
18 Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011) (quoting
19 Falcon, 457 U.S. at 160-61). "Frequently that 'rigorous analysis'
20 will entail some overlap with the merits of the plaintiff's
21 underlying claim. That cannot be helped." Dukes, 131 S. Ct. at
22 2551. To satisfy itself that class certification is proper, the
23 court may consider material beyond the pleadings and require
24 supplemental evidentiary submissions by the parties. Blackie, 524
25 F.2d at 901 n.17. "When resolving such factual disputes in the
26 context of a motion for class certification, district courts must
27 consider 'the persuasiveness of the evidence presented.'" Aburto
28 v. Verizon Cal., Inc., 2012 WL 10381, at *2 (C.D. Cal.) (quoting

1 Ellis v. Costco Wholesale Corp., 657 F.3d 970, 982 (9th Cir.
2 2011)). Ultimately, it is in the district court's discretion
3 whether a class should be certified. Molski v. Gleich, 318 F.3d
4 937, 946 (9th Cir. 2003); Burkhalter Travel Agency v. MacFarms
5 Int'l, Inc., 141 F.R.D. 144, 152 (N.D. Cal. 1991).

6 ANALYSIS

7 I. Excessive Lease Amount Class

8 Plaintiffs seek certification of the Excessive Lease Amount
9 class to bring a claim under the Racketeer Influenced and Corrupt
10 Organizations Act (RICO), and RICO conspiracy and fraud claims
11 against Leasing Defendants. Plaintiffs also seek certification of
12 a California subclass to bring a claim under California's unfair
13 competition law (UCL), California Business and Professions Code
14 §§ 17200 et seq., and negligent misrepresentation claims. Leasing
15 Defendants contend that certification must be denied because
16 Plaintiffs have failed to satisfy their burden with respect to
17 commonality, predominance and typicality.

18 A. Numerosity

19 Plaintiffs assert that there would be approximately 2,000
20 members in the Excessive Lease Amount class. Leasing Defendants
21 do not contest this figure. The Court finds that Plaintiffs
22 satisfy the numerosity requirement with respect to the Excessive
23 Lease Amount class.

24 B. Commonality and Predominance

25 Rule 23 contains two related commonality provisions. Rule
26 23(a)(2) requires that there be "questions of law or fact common
27 to the class." Fed. R. Civ. P. 23(a)(2). Rule 23(b)(3), in turn,
28

1 requires that such common questions predominate over individual
2 ones.

3 The Ninth Circuit has explained that Rule 23(a)(2) does not
4 preclude class certification if fewer than all questions of law or
5 fact are common to the class:

6 The commonality preconditions of Rule 23(a)(2) are less
7 rigorous than the companion requirements of Rule
8 23(b)(3). Indeed, Rule 23(a)(2) has been construed
9 permissively. All questions of fact and law need not be
10 common to satisfy the rule. The existence of shared
11 legal issues with divergent factual predicates is
12 sufficient, as is a common core of salient facts coupled
13 with disparate legal remedies within the class.

14 Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998).

15 Rule 23(b)(3), in contrast, requires not just that some
16 common questions exist, but that those common questions
17 predominate. In Hanlon, the Ninth Circuit discussed the
18 relationship between Rule 23(a)(2) and Rule 23(b)(3):

19 The Rule 23(b)(3) predominance inquiry tests whether
20 proposed classes are sufficiently cohesive to warrant
21 adjudication by representation. This analysis presumes
22 that the existence of common issues of fact or law have
23 been established pursuant to Rule 23(a)(2); thus, the
24 presence of commonality alone is not sufficient to
25 fulfill Rule 23(b)(3). In contrast to Rule 23(a)(2),
26 Rule 23(b)(3) focuses on the relationship between the
27 common and individual issues. When common questions
28 present a significant aspect of the case and they can be
resolved for all members of the class in a single
adjudication, there is clear justification for handling
the dispute on a representative rather than on an
individual basis.

29 Id. at 1022 (citations and internal quotation marks omitted).

30 Plaintiffs argue that common questions of law and fact
31 predominate for each of the claims it seeks to assert on behalf of
32 the Excessive Lease Amount class.

33 1. RICO, RICO Conspiracy and Fraud Claims

34 "The elements of a civil RICO claim are as follows:

(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (known as predicate acts) (5) causing injury to plaintiff's business or property." Living Designs, Inc. v. E.I. Dupont de Nemours & Co., 431 F.3d 353, 361 (9th Cir. 2005) (citation and internal quotation marks omitted). "Causation lies at the heart of a civil RICO claim." Poulos v. Caesars World, Inc., 379 F.3d 654, 664 (9th Cir. 2004) (citations omitted). "Lumping claims together in a class action does not diminish or dilute this requirement." Id. To maintain a civil RICO claim based on mail fraud, a plaintiff must show that the defendant's "alleged misconduct proximately caused the injury." Id. Under California law, "[a] cause of action for fraud requires the plaintiff to prove (a) a knowingly false misrepresentation by the defendant, (b) made with the intent to deceive or to induce reliance by the plaintiff, (c) justifiable reliance by the plaintiff, and (d) resulting damages." Glenn K. Jackson Inc. v. Roe, 273 F.3d 1192, 1201 (9th Cir. 2001).

Plaintiffs assert that their RICO claims involve a common set of facts and legal theories concerning whether Defendants were engaged in an association-in-fact enterprise, whether Defendants participated, directed or controlled the conduct of the enterprise and whether they did so through a pattern of racketeering activity. With respect to their fraud claim, Plaintiffs assert that common questions exist with respect to whether Leasing Defendants acted with an intent to defraud and whether Merchant Defendants were acting as Leasing Defendants' agents when they made false or misleading representations to the class.

1 Leasing Defendants counter that Plaintiffs have failed to
2 establish commonality and predominance with respect to their RICO
3 and fraud claims because there are numerous issues that require an
4 individualized inquiry. Specifically, Leasing Defendants argue
5 that Plaintiffs must show whether an actionable omission or
6 misrepresentation was made to each lessee and, if so, whether the
7 lessee relied upon that omission or misrepresentation. In
8 addition, Leasing Defendants contend that individualized questions
9 of damages and standing preclude certification of the class.

10 a. Misrepresentations or Omissions

11 Leasing Defendants first argue that Plaintiffs have failed to
12 allege that they, as opposed to Merchant Services Defendants, made
13 any affirmative misrepresentations to induce Plaintiffs to enter
14 into any lease. Accordingly, Leasing Defendants argue that
15 Plaintiffs' claims against them must be based on omissions.
16 Moreover, Leasing Defendants argue, RICO claims based on fraud by
17 omission require Plaintiffs to show that Leasing Defendants owed
18 them a statutory or fiduciary duty to disclose information and
19 Plaintiffs do not allege such a duty. Similarly, to assert a
20 claim for fraud based on omissions under California law,
21 Plaintiffs must demonstrate that Leasing Defendants owed them a
22 duty to disclose, such as a statutory duty. See OCM Principal
23 Opportunities Fund v. CIBC World Mkts. Corp., 157 Cal. App. 4th
24 835, 845 (2007) ("to establish fraud through nondisclosure or
25 concealment of facts, it is necessary to show the defendant was
26 under a legal duty to disclose them.") (internal quotation marks
27 omitted). Plaintiffs agree that they did not have any direct
28 contact with Leasing Defendants and also concede that there must

1 be a duty to disclose in order to assert a RICO or fraud claim
2 based on omissions alone. However, Plaintiffs have not identified
3 any such duty that they are owed by Leasing Defendants.

4 Without an affirmative misrepresentation or omission, the
5 only other basis for a RICO or fraud claim in this case would be
6 to show that Merchant Services Defendants presented Plaintiffs
7 with a half-truth, giving rise to a duty by Leasing Defendants to
8 disclose additional information to prevent that half-truth from
9 being misleading. Leasing Defendants assert that no such half-
10 truths are alleged, and that even if they were, individualized
11 inquiries would be needed to determine the half-truths that were
12 presented to individual class members.

13 Plaintiffs counter that they have alleged a common scheme in
14 which Leasing Defendants conspired with Merchant Services
15 Defendants to mislead Plaintiffs. Plaintiffs assert that Leasing
16 Defendants were aware of Merchant Defendants' fraudulent
17 activities "and either aided it or failed to stop it." Joint
18 Equity Comm. of Investors of Real Estate Partners, Inc. v.
19 Coldwell Banker Real Estate Corp., 281 F.R.D. 422, 424 (C.D. Cal.
20 2012). Plaintiffs assert that Merchant Services Defendants used
21 uniform marketing materials indicating that Merchant Services was
22 a "Registered ISO," which it was not. In addition, Plaintiffs
23 allege that they each received the same allegedly misleading Rate
24 Sheet from Merchant Services Defendants. However, to the extent
25 that these alleged misrepresentations were universally presented
26 to the merchants, Plaintiffs have not established that the
27 misrepresentations were material. When asked to identify other
28 material misrepresentations, Plaintiffs responded that Merchant

1 Services Defendants and Leasing Defendants agreed that the first
2 and last month payment fields would be left blank on the
3 merchants' lease forms at the time the merchants signed them.
4 However, when asked whether either Merchant Services or Leasing
5 Defendants lied to the merchants regarding the amounts of those
6 payments, Plaintiffs conceded that the question "raises individual
7 issues" and accordingly is "not the basis" of the class
8 certification motion.⁴ Transcript at 10.

9 The Court finds that Plaintiffs have failed to establish that
10 common questions predominate with respect to misrepresentations or
11 omissions.

12 b. Proximate Cause and Reliance

13 Plaintiffs argue that the Court can infer reliance on
14 Defendants' misrepresentations on a class-wide basis, despite the
15 fact that Plaintiffs signed documents containing the terms of the
16 agreements, because the entire scheme was structured to trick
17 merchants into enrolling in the leases. Moreover, Plaintiffs
18 argue that, given the disadvantageous terms of the leases, no
19 merchant would have agreed to the lease unless it had relied upon
20 Defendants' misrepresentations. See, e.g., Negrete v. Alliance
21 Life Ins. Co. of N. Am., 238 F.R.D. 482, 491 (C.D. Cal. 2006)
22 (finding a "common sense inference that no rational class member
23

24 ⁴ Leasing Defendants contend that allegations about blanks in
25 leases and forged signatures defeat typicality for Plaintiffs for
26 all of the classes. However, such allegations would only be
27 relevant to Plaintiffs' RICO and fraud claims, for which the Court
28 finds Plaintiffs have failed to establish that common questions
predominate. Because these allegations are not relevant to
Plaintiffs' other breach of contract and UCL claims, they do not
impact the typicality analysis for those claims

1 would purchase the annuities in question[] upon adequate
2 disclosure of the facts, regardless of their individual
3 circumstances.").

4 Leasing Defendants argue that reliance cannot be inferred on
5 a class-wide basis because there is more than one logical reason
6 that a class member might want to enter into a lease, even if it
7 cost more than purchasing the product outright. For example,
8 Leasing Defendants assert that a merchant might have "evaluated
9 the prices being charged by other ISO's, and made a decision that
10 the Leasing Defendants' lease prices were comparable." Leasing
11 Defendants' Opposition at 17. Plaintiffs counter that, within
12 days of signing the agreement, the merchant would have paid more
13 than the purchase price of the equipment, with forty-six
14 additional payments remaining. However, as discussed above,
15 Plaintiffs have defined the class as any merchant "whose monthly
16 lease amounts exceeded Northern Leasing's standard rate caps."
17 Am. Not. of Ps' Am. Mot. for Class Cert. at 1 n.1. There is
18 nothing to suggest that Northern Leasing's standard rate cap,
19 which Plaintiffs concede is not a legal limit on lease amounts, is
20 the outer limit of a reasonable amount that a person would agree
21 to pay for the type of lease in question. Accordingly, reliance
22 cannot be presumed for a class defined by those rate caps.

23 The Court finds that individual issues of reliance will
24 predominate with respect to individual class members' reliance on
25 the alleged fraud. Accordingly, the Court denies Plaintiffs'
26 motion for class certification with respect to the Excessive Lease
27 Amount Class's RICO, RICO conspiracy and fraud claims.
28

2. Negligent Misrepresentation Claim

Leasing Defendants first argue that the Excessive Lease Amount Class's negligent misrepresentation claim fails on the merits because there is no evidence that they, as Leasing Defendants, and not Merchant Services Defendants, made any affirmative misrepresentations or had any duty to disclose the alleged misrepresentations by Merchant Services Defendants. "A negligent misrepresentation claim requires a positive assertion, not merely an omission." Lopez v. Nissan North America, 201 Cal. App. 4th 572, 596 (2011) (internal quotation marks omitted). At oral argument, Plaintiffs did not dispute this requirement. Plaintiffs also concede that Leasing Defendants did not have any interactions with the putative class members. Because Plaintiffs concede that they cannot maintain a claim against Leasing Defendants for negligent misrepresentation, there are no common issues for the Court to decide.

3. UCL Claim

California's UCL prohibits any "unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code § 17200. The UCL incorporates other laws and treats violations of those laws as unlawful business practices independently actionable under state law. Chabner v. United of Omaha Life Ins. Co., 225 F.3d 1042, 1048 (9th Cir. 2000). Violation of almost any federal, state or local law may serve as the basis for a UCL claim. Saunders v. Superior Court, 27 Cal. App. 4th 832, 838-39 (1994). In addition, a business practice may be "unfair or fraudulent in violation of the UCL even if the practice does not violate any law." Olszewski v. Scripps Health, 30 Cal. 4th 798, 827 (2003).

1 In the 3AC, Plaintiffs allege both violations of law and
2 other unfair business practices as the basis for their UCL claims.
3 Leasing Defendants assert that common issues do not predominate
4 for the Excessive Lease Amount California subclass because the
5 claim will require individualized proof of reliance and
6 causation.⁵ Plaintiffs counter that only class representatives
7 need to demonstrate reliance. However, California law requires a
8 UCL claim to allege actual reliance. In re Tobacco II Cases, 46
9 Cal. 4th 298, 328 (2009). "Reliance is proved by showing that the
10 defendant's misrepresentation or nondisclosure was 'an immediate
11 cause' of the plaintiff's injury-producing conduct. A plaintiff
12 may establish that the defendant's misrepresentation is an
13 'immediate cause' of the plaintiff's conduct by showing that in
14 its absence the plaintiff 'in all reasonable probability' would
15 not have engaged in the injury-producing conduct." Id. at 326
16 (citations omitted).

17 As discussed above, the Court rejects Plaintiffs' argument
18 that reliance can be presumed for every merchant whose monthly
19 lease amount exceeded Northern Leasing's standard rate caps.
20 Plaintiffs provide no other grounds for presuming reliance on a
21 class-wide basis for the Excessive Lease Amount California
22

23 ⁵ Leasing Defendants also argue that Plaintiffs lack standing
24 for all of the proposed classes' UCL claims because Plaintiffs are
25 merchants who have entered into commercial contracts with Leasing
26 Defendants. However, as the court in In re Yahoo! Litigation,
27 251 F.R.D. 459, 475 (C.D. Cal. 2008), held, where a proposed class
28 of plaintiffs is not "uniformly sophisticated and capable of
seeking relief against defendants," the fact that the plaintiffs
are businesses does not establish that they lack standing. Here,
Plaintiffs are relatively unsophisticated small businesses.

1 subclass. Accordingly, the Court finds that individual issues
2 regarding reliance will predominate with respect to the Excessive
3 Lease Amount California subclass.

4 C. Typicality

5 Rule 23(a)(3)'s typicality requirement provides that a "class
6 representative must be part of the class and possess the same
7 interest and suffer the same injury as the class members."
8 Falcon, 457 U.S. at 156 (quoting E. Tex. Motor Freight Sys., Inc.
9 v. Rodriguez, 431 U.S. 395, 403 (1977)) (internal quotation marks
10 omitted). The purpose of the requirement is "to assure that the
11 interest of the named representative aligns with the interests of
12 the class." Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th
13 Cir. 1992). Rule 23(a)(3) is satisfied where the class
14 representatives have the same or similar injury as the unnamed
15 class members, the action is based on conduct which is not unique
16 to the named plaintiffs, and other class members have been injured
17 by the same course of conduct. Id. Class certification is
18 inappropriate, however, "where a putative class representative is
19 subject to unique defenses which threaten to become the focus of
20 the litigation." Id. (quoting Gary Plastic Packaging Corp. v.
21 Merrill Lynch, Pierce, Fenner & Smith, Inc., 903 F.2d 176, 180 (2d
22 Cir. 1990)).

23 Plaintiffs assert that they all have claims typical of the
24 Excessive Lease Amount Class because "all their leases were for
25 amounts that exceeded the standard monthly lease caps."
26 Plaintiffs' Amended Motion for Class Certification at 33.
27 However, this simply shows that Plaintiffs would be members of the
28 class if certified. As Plaintiffs themselves argue and as

1 discussed above, the Excessive Lease Class's claims are not
2 substantively based on the lease caps. Accordingly, Plaintiffs
3 have not demonstrated that their claims are typical of the
4 proposed class. Plaintiffs have also failed to meet their burden
5 with respect to typicality for the Excessive Lease Amount Class.

6 D. Adequacy

7 Rule 23(a)(4) establishes as a prerequisite for class
8 certification that "the representative parties will fairly and
9 adequately protect the interests of the class." Fed. R. Civ. P.
10 23(a)(4). Plaintiffs assert that they will fairly and adequately
11 protect the interests of the class. Leasing Defendants do not
12 contest this. The Court finds Plaintiffs have met their burden on
13 this prong.

14 E. Superiority

15 In addition to predominance, Rule 23(b)(3) requires that
16 Plaintiffs establish that "a class action is superior to other
17 available methods for fairly and efficiently adjudicating the
18 controversy." As discussed above, the Court finds that individual
19 issues, particularly issues related to Plaintiffs' reliance on
20 Leasing Defendants' alleged fraud, will predominate. Accordingly,
21 a class action is not superior with respect to Plaintiffs'
22 proposed Excessive Lease Amount Class or the Excessive Lease
23 Amount California subclass and the Court denies certification of
24 these classes.

25 II. SKS Post-Lease Expiration Class

26 Plaintiffs seek certification of a SKS Post-Lease Expiration
27 class to bring RICO and RICO conspiracy claims, and a SKS Post-
28 Lease Expiration California subclass to bring a UCL claim.

1 A. Numerosity

2 Plaintiffs assert that there would be more than 100,000
3 members in the SKS Post-Lease Expiration Class. Leasing
4 Defendants do not contest this figure. The Court finds that
5 Plaintiffs satisfy the numerosity requirement with respect to the
6 SKS Post-Lease Expiration Class.

7 B. Commonality and Predominance

8 1. RICO and RICO Conspiracy Claims

9 As discussed above, the Court finds that individual issues
10 predominate with respect to Plaintiffs' alleged RICO and RICO
11 conspiracy claims. Accordingly, the Court will not certify the
12 SKS Post-Lease Expiration class to pursue such claims.

13 2. UCL Claim

14 Plaintiffs' UCL claim on behalf of the proposed SKS Post-
15 Lease Expiration California subclass is based on the theory that
16 Leasing Defendants conspired with one another to defraud former
17 lessees by collecting purported taxes that were not actually due
18 or paid to any taxing authority. Plaintiffs allege that Leasing
19 Defendants conducted a faulty simulation to determine how much to
20 charge those former lessees and compiled the results on a
21 spreadsheet referred to as Schedule 1. Plaintiffs further allege
22 that Leasing Defendants made or attempted to make unauthorized ACH
23 deductions from merchants' bank accounts in their efforts to
24 collect the purported taxes.

25 The Court finds that common questions exist and predominate.
26 Such issues include the propriety of Leasing Defendants'
27 simulation to determine whether taxes were due and whether class
28

1 members' form ACH agreements authorized the deductions after their
2 leases had expired.

3 3. Defenses

4 Leasing Defendants assert that Plaintiffs cannot meet their
5 burden with respect to commonality and predominance as to any of
6 their classes and claims because individualized inquiries are
7 necessary to determine whether individual class members are
8 subject to various defenses. First Leasing Defendants argue that
9 class action waivers or one year limitations on the commencement
10 of actions appear in the leases of "many" putative class members.
11 However, the legal questions of whether the limitations are
12 enforceable are themselves common questions of law. Moreover, it
13 appears that Leasing Defendants maintain records of which leases
14 contain each type of provision, allowing Leasing Defendants to
15 determine to which putative class member each contractual defense
16 applies. See, e.g., Kravic Dec. at ¶ 41 ("Leasing Defendants
17 estimate that at least 214,000 leases executed during the Putative
18 Class Period since contain a limitation on action provision of one
19 year.")

20 Leasing Defendants next argue that many putative class
21 members are subject to the defense of res judicata because Leasing
22 Defendants have obtained judgments against them or releases of
23 claims from them. However, the Court finds that the existence of
24 these judgments and releases does not detract from the
25 predominance of common questions of law to the extent they exist.
26 If the case settles or any of the classes prevail on their claims,
27 Leasing Defendants can use their records to assert defenses they
28 believe apply to individual class members during the claims

1 process. Accordingly, the Court finds that these defenses do not
2 defeat commonality and predominance where Plaintiffs have
3 established them.

4 C. Typicality

5 As noted above, the SKS Post-Lease Expiration Class is
6 defined as "All persons and businesses whose lease numbers
7 appeared on Schedule 1." Plaintiffs' Amended Motion for Class
8 Certification at x. Schedule 1 is a document created by Leasing
9 Defendants as a result of a simulation they conducted to determine
10 the former lessees from which they would seek taxes.

11 Leasing Defendants argue that Plaintiff Campbell, the only
12 Plaintiff named as a class representative for this class, lacks
13 standing because Leasing Defendants have not successfully deducted
14 any fees or taxes from her account since her lease expired.
15 Plaintiffs counter that, although Leasing Defendants were not able
16 to deduct money from Plaintiff Campbell's bank account, when she
17 received the notice of debt from Leasing Defendants, she spent
18 time away from her usual work and paid an assistant to assist her
19 in researching and compiling financial records. The Court finds
20 that this is sufficient to establish that Campbell has standing to
21 pursue a UCL claim. Although Campbell may not be able to collect
22 money damages, she can seek injunctive relief. If liability is
23 established, those individuals in the class who can demonstrate

1 that they have had fees deducted from their bank accounts after
2 their leases were terminated can also seek money damages.⁶

3 D. Adequacy

4 Plaintiffs assert that they will fairly and adequately
5 protect the interests of the SKS Post-Lease Expiration class.
6 Leasing Defendants do not contest this. The Court finds
7 Plaintiffs have met their burden on this prong.

8 E. Superiority

9 As discussed above, the Court finds that individual issues
10 will predominate with respect to Plaintiffs' RICO and RICO
11 conspiracy claims. Accordingly, a class action is not superior
12 with respect to Plaintiffs' proposed SKS Post-Lease Expiration
13 Class and the Court denies certification of this class.

14 However, the members of the SKS Post-Lease Expiration
15 California subclass satisfy the superiority prerequisite for their
16 UCL claim. The risks, small recovery, and relatively high costs
17

18 ⁶ Leasing Defendants also argue that all potential members of
19 the SKS Post-Lease Expiration Class lack standing because they are
20 all eligible for restitution for all amounts deducted from their
21 bank accounts as part of the settlement of People of the State of
22 New York v. SKS Associates LLC, et al., Supreme Court of State of
23 N.Y., Index No. 400909/12. However, to the extent that these
24 individuals are entitled to restitution, Plaintiffs correctly
25 argue that the New York settlement released only the New York
26 state law claims raised by the New York State Attorney General in
27 that case. Moreover, the Consent Decree specifically provides
28 that nothing contained within it "shall be construed as to deprive
any individual or entity of any private right of action under the
law." Consent Decree at ¶ 33. To the extent members of the SKS
Post-Lease Expiration Class receive restitution from the New York
settlement, that amount shall simply be deducted from any recovery
in this case.

1 of litigation here make it unlikely that individual merchants will
2 pursue claims against Leasing Defendants independently. A class
3 action, however, "would offer those with small claims the
4 opportunity for meaningful redress." Sullivan v. Kelly Services,
5 Inc., 268 F.R.D. 356, 365 (N.D. Cal. 2010). In addition, a class
6 action would more efficiently resolve the numerous legal and
7 factual questions relevant to this subclass's claim against
8 Leasing Defendants. Accordingly, the class action is superior to
9 individual litigation for this subclass.

10 The Court certifies the SKS Post-Lease Expiration California
11 subclass to pursue its UCL claim.

12 III. Property Tax Fee Non-Disclosure Class

13 Plaintiffs seek certification of a Property Tax Fee Non-
14 Disclosure class (Non-Disclosure class) to bring RICO, RICO
15 conspiracy and fraud claims and breach of contract claims.
16 Plaintiffs further seek certification of a Non-Disclosure
17 California subclass to bring negligent misrepresentation, breach
18 of the duty of good faith and fair dealing and UCL claims. These
19 claims are based on Plaintiffs' allegations that Leasing
20 Defendants assessed administrative fees not provided for in the
21 proposed class members' leases.

22 A. Numerosity

23 Plaintiffs estimate that there are more than 10,000 members
24 of the Non-Disclosure class. Leasing Defendants do not dispute
25 this figure. The Court finds that Plaintiffs have met their
26 burden with respect to numerosity for this class.

1 B. Commonality and Predominance

2 1. RICO, RICO Conspiracy and Fraud Claims

3 As discussed above, the Court finds that Plaintiffs have
4 failed to establish commonality or predominance with respect to
5 any of their RICO, RICO conspiracy or fraud claims. Accordingly,
6 the Court denies the motion for certification with respect to the
7 Non-Disclosure class's RICO, RICO conspiracy and fraud claims.

8 2. Breach of Contract Claim

9 The elements of a breach of contract claim are (1) the
10 existence of a contract; (2) the plaintiff's performance or excuse
11 for non-performance; (3) the defendant's breach; and (4) damages
12 to the plaintiff as a result of the breach. Armstrong Petrol.
13 Corp. v. Tri-Valley Oil & Gas Co., 116 Cal. App. 4th 1375, 1391
14 n.6 (2004). Plaintiffs assert that common questions regarding the
15 interpretation of the form leases are likely to drive the outcome
16 of this contract claim, specifically whether the leases authorize
17 Leasing Defendants to assess the twenty-five dollar administrative
18 fee. Plaintiffs allege that the members of this proposed class
19 entered into leases that provided, "Lessor will add such taxes,
20 fees, and other charges to the monthly payments hereunder
21 including handling and administrative costs." See, e.g.,
22 Simplicio Ex. I. Plaintiffs further argue, "There is no evidence
23 that Defendants incurred" such costs. Amended Motion for Class
24 Certification at 17-18.

25 However, while the amount of the fee was not disclosed in the
26 potential class members' leases, the fact that a fee could be
27 assessed was disclosed. Accordingly, individual analysis would be
28 required with respect to whether the twenty-five dollar fee

1 assessed was appropriate in each merchant's case. Such analysis
2 might require information about the actual costs incurred by
3 Leasing Defendants. The Court finds that Plaintiffs have failed
4 to establish that common questions of fact and law will
5 predominate with respect to the Non-Disclosure class's breach of
6 contract claim.

7 3. Negligent Misrepresentation

8 Plaintiffs seek certification of a California subclass to
9 bring a negligent misrepresentation claim. As discussed above,
10 Plaintiffs concede that they cannot maintain a negligent
11 misrepresentation claim absent an affirmative misstatement by
12 Leasing Defendants. Plaintiffs further concede that Leasing
13 Defendants had no direct contact with them. Because Plaintiffs
14 cannot maintain this claim, there are no common issues of law or
15 fact.

16 4. Claim for Breach of the Duty of Good Faith and Fair 17 Dealing

18 Plaintiffs also seek certification of a California subclass
19 to bring a claim for breach of the duty of good faith and fair
20 dealing. Under California law, "[t]here is an implied covenant of
21 good faith and fair dealing in every contract that neither party
22 will do anything which will injure the right of the other to
23 receive the benefits of the agreement." Comunale v. Traders &
24 Gen. Ins. Co., 50 Cal. 2d 654, 658 (1958). To prevail on a claim
25 for breach of the implied covenant, the claimant must establish
26 "that the conduct of the [opposing party], whether or not it also
27 constitutes a breach of a consensual contract term, demonstrates a
28 failure or refusal to discharge contractual responsibilities,

1 prompted not by an honest mistake, bad judgment or negligence but
2 rather by a conscious and deliberate act." Careau & Co. v.
3 Security Pac. Business Credit, Inc., 222 Cal. App. 3d 1371, 1395
4 (1990).

5 The allegations upon which this duty of good faith and fair
6 dealing claim is based are the same as those supporting the breach
7 of contract claims. As discussed above, resolution of these
8 claims will require individualized analysis with respect to
9 whether the twenty-five dollar fees were properly assessed.
10 Accordingly, the Court finds that common issues of fact and law do
11 not predominate with respect to the proposed Non-Disclosure
12 California subclass's claim for breach of the duty of good faith
13 and fair dealing.

14 5. UCL Claim

15 Plaintiffs' UCL claim on behalf of the proposed Non-
16 Disclosure California subclass is based on the theory that Leasing
17 Defendants knowingly assessed fees not provided for in the
18 merchants' leases. However, the allegations upon which the UCL
19 claim is based are the same as those supporting the breach of
20 contract claim and the claim for the breach of the duty of good
21 faith and fair dealing. Resolution of these claims will require
22 individualized analysis with respect to the propriety of the
23 twenty-five dollar fees. The Court finds that common issues of
24 fact and law do not predominate with respect to the proposed Non-
25 Disclosure California subclass's UCL claim.

26 C. Typicality

27 Plaintiffs assert that each of the proposed class
28 representatives for the Non-Disclosure class was enrolled in a

1 lease that did not provide for a twenty-five dollar administrative
2 fee and each of the proposed representatives was assessed a
3 twenty-five dollar fee via automatic debit from its bank account.
4 The Court finds that Plaintiffs have met their burden with respect
5 to typicality.

6 D. Adequacy

7 Plaintiffs assert that they will fairly and adequately
8 protect the interests of the class. Leasing Defendants do not
9 contest this. The Court finds Plaintiffs have met their burden on
10 this prong.

11 E. Superiority

12 As discussed above, the Court finds that individual issues
13 will predominate for the Non-Disclosure Class's claims.
14 Accordingly a class action is not superior with respect to
15 Plaintiffs' proposed Non-Disclosure Class or the Non-Disclosure
16 California subclass and the Court does not certify those classes.

17 IV. Property Tax Equipment Cost Basis Class

18 Plaintiffs seek certification of a Property Tax Equipment
19 Cost Basis (Equipment Cost Basis) class to bring RICO, RICO
20 conspiracy, fraud and breach of contract claims. Plaintiffs
21 further seek certification of an Equipment Cost Basis California
22 subclass to bring negligent misrepresentation, breach of the duty
23 of good faith and fair dealing and UCL claims. These claims are
24 based on Plaintiffs' allegations that Leasing Defendants
25 improperly assessed property taxes based on the purportedly
26 inflated "acquisition cost," including all amounts Leasing
27 Defendants paid to acquire a merchant's lease from Merchant
28

1 Services Defendants, rather than the actual value of the
2 equipment. Plaintiffs further allege that, even after changing
3 their practice in late 2009 to assess taxes based on equipment
4 cost, Leasing Defendants did not inform the merchants that they
5 had changed their practices or provide any refund of the
6 previously assessed taxes.

7 A. Numerosity

8 Plaintiffs estimate that there are more than 10,000 members
9 of the Equipment Cost Basis class. Leasing Defendants do not
10 dispute this figure. The Court finds that Plaintiffs have met
11 their burden with respect to numerosity for this class.

12 B. Commonality and Predominance

13 1. RICO, RICO Conspiracy and Fraud Claims

14 As discussed above, the Court finds that Plaintiffs have
15 failed to establish commonality or predominance with respect to
16 any of their RICO, RICO conspiracy or fraud claims. Accordingly,
17 the Court denies the motion for certification with respect to this
18 class's RICO, RICO conspiracy and fraud claims.

19 2. Breach of Contract Claim

20 Plaintiffs assert that the predominant common question for
21 the proposed Equipment Cost Basis class's breach of contract claim
22 is "whether Defendants charged amounts greater than property taxes
23 actually owed." Amended Motion for Class Certification at 43.

24 Leasing Defendants counter that common questions cannot
25 predominate for the Equipment Cost Basis Class, because Plaintiffs
26 will be required to demonstrate what taxes each class member
27 should have paid in order to determine whether it was charged in
28

1 excess of that amount. To do so, Leasing Defendants argue that
2 they will need to make individualized inquiries under the laws of
3 over 3,500 taxing jurisdictions in which Leasing Defendants are
4 required to pay personal property taxes.

5 However, as Plaintiffs point out, the predominant questions
6 are whether Leasing Defendants' use of the "acquisition cost" to
7 calculate taxes was improper, whether Leasing Defendants had a
8 fiduciary duty to Plaintiffs to calculate their taxes properly
9 when they assumed the duty to assess and pay taxes on Plaintiffs'
10 behalf and whether Leasing Defendants breached that duty by using
11 the "acquisition cost" to calculate taxes. No matter what the tax
12 rate is in a given jurisdiction, using an inflated figure to
13 calculate taxes would lead to an incorrect assessment.
14 Accordingly, the Court finds that Plaintiffs have met their burden
15 with respect to commonality and predominance for the Property Tax
16 Equipment Cost Basis Class's breach of contract claim.

17 3. Negligent Misrepresentation Claim

18 Plaintiffs seek certification of a California Equipment Cost
19 Basis subclass to bring a negligent misrepresentation claim. As
20 discussed above, Plaintiffs concede that they cannot maintain a
21 negligent misrepresentation claim absent an affirmative
22 misstatement by Leasing Defendants. Plaintiffs further concede
23 that Leasing Defendants had no direct contact with them. Because
24 Plaintiffs cannot maintain this claim, there are no common issues
25 of law or fact.
26
27
28

1 4. Claim for Breach of the Duty of Good Faith and Fair
2 Dealing

3 Plaintiffs also seek certification of a California Equipment
4 Cost Basis subclass to bring a claim for breach of the duty of
5 good faith and fair dealing. The same common questions of fact
6 and law that will drive resolution of the Equipment Cost Basis
7 class's breach of contract claims will drive the resolution of the
8 subclass's claim for breach of the duty of good faith and fair
9 dealing. The Court finds that Plaintiffs have established
10 commonality and predominance with respect to the Equipment Cost
11 Basis California subclass's claim for breach of the covenant of
12 good faith and fair dealing.

13 5. UCL Claim

14 Plaintiffs' UCL claim on behalf of the proposed Equipment
15 Cost Basis California subclass is based on the theory that Leasing
16 Defendants knowingly and improperly calculated property taxes
17 based on the "acquisition cost" of the lease rather than the value
18 of the equipment itself. Common questions exist and predominate,
19 including whether it was permissible for Leasing Defendants to
20 calculate property taxes based on the "acquisition cost."
21 Similarly, there is a common question with respect to Leasing
22 Defendants' state of mind when they calculated those taxes.

23 The Court finds that Plaintiffs have established commonality
24 and predominance with respect to the Equipment Cost Basis
25 California subclass's UCL claims.

26 C. Typicality

27 Plaintiffs assert that each of the proposed class
28 representatives for the Equipment Cost Basis class was assessed

1 property taxes that were calculated using the "acquisition cost"
2 rather than the value of the equipment itself. The Court finds
3 that Plaintiffs have met their burden on this prong.

4 D. Adequacy

5 Plaintiffs assert that they will fairly and adequately
6 protect the interests of the class. Leasing Defendants do not
7 contest this. The Court finds Plaintiffs have met their burden on
8 this prong.

9 E. Superiority

10 Plaintiffs satisfy the superiority prerequisite for the
11 Equipment Cost Basis class's breach of contract claim and the
12 Equipment Cost Basis California subclass's claim for breach of the
13 duty of good faith and fair dealing and UCL claim. The risks,
14 small recovery, and relatively high costs of litigation here make
15 it unlikely that individual merchants will pursue claims against
16 Leasing Defendants independently. A class action, however, "would
17 offer those with small claims the opportunity for meaningful
18 redress." Sullivan v. Kelly Services, Inc., 268 F.R.D. 356, 365
19 (N.D. Cal. 2010). In addition, a class action would more
20 efficiently resolve the numerous legal and factual questions
21 relevant to these classes' claims against Leasing Defendants.
22 Accordingly, the class action is superior to individual litigation
23 for this class.

24 The Court certifies the Equipment Cost Basis Class to pursue
25 its breach of contract claim and the Equipment Costs Basis
26 California subclass to pursue its claim for breach of the duty of
27 good faith and fair dealing and UCL claim.

28

1 V. Credit Monitoring Class

2 Plaintiffs seek certification of a Credit Monitoring class to
3 bring a claim pursuant to the Fair Credit Reporting Act (FCRA), 15
4 U.S.C. §§ 1681 et seq., and a Credit Monitoring California
5 subclass to bring a UCL claim. At the hearing on the motion for
6 class certification, Plaintiffs stated that the Credit Monitoring
7 class itself is "a subclass of" the Excessive Lease Amount class
8 and suggested that certification of the Credit Monitoring class
9 depended on certification of the Excessive Lease Amount class.
10 Transcript at 49. Indeed, the Credit Monitoring class's claims
11 rely on a presumption that it was inappropriate for Leasing
12 Defendants to try to collect "amounts due on a lease whose monthly
13 amounts exceeds Northern Leasing's standard rate caps." As
14 discussed above, the Court cannot presume that such leases are
15 unenforceable. Accordingly, resolution of the proposed Credit
16 Monitoring class's claims would require individual inquiries as to
17 the enforceability of each class member's lease. The Court denies
18 certification of the Credit Monitoring class.

19 VII. Appointment of Class Counsel

20 Rule 23(g)(1) of the Federal Rules of Civil Procedure
21 provides in relevant part:

22 Unless a statute provides otherwise, a court that
23 certifies a class must appoint class counsel. In
appointing class counsel, the court:

24 (A) must consider:

25 (i) the work counsel has done in identifying or
26 investigating potential claims in the action;

27 (ii) counsel's experience in handling class
28 actions, other complex litigation, and the types of
claims asserted in the action;

(iii) counsel's knowledge of the applicable law;
and

(iv) the resources that counsel will commit to
representing the class;

(B) may consider any other matter pertinent to counsel's
ability to fairly and adequately represent the interests
of the class;

(C) may order potential class counsel to provide
information on any subject pertinent to the appointment
and to propose terms for attorney's fees and nontaxable
costs;

(D) may include in the appointing order provisions about
the award of attorney's fees or nontaxable costs under
Rule 23(h); and

(E) may make further orders in connection with the
appointment.

Fed. R. Civ. P. 23(g)(1).

Plaintiffs' counsel has offered evidence that they are
experienced in class action litigation and appeals and that they
have committed considerable time and resources to the litigation
of this case to date. Leasing Defendants do not contest
Plaintiffs' request to have their counsel appointed as class
counsel. Accordingly, the Court will appoint Plaintiffs' counsel
as class counsel.

VIII. Compliance with the Court's Local Rules

Both parties include extensive footnotes that do not comply
with the Local Rule's font requirements. See Local Rule 3-
4(c)(2). Leasing Defendants' opposition contains thirty-seven
footnotes in text smaller than the required 12-point font.
Plaintiffs' reply similarly contains thirty footnotes in text
smaller than the required 12-point font. Among those footnotes
are several that are the length of a full paragraph. Leasing

1 Defendants include one footnote that is two full paragraphs long.

2 In their Sur-Reply, Leasing Defendants also include multiple
3 citations to their Opposition generally without providing a
4 specific page number. See, e.g. Leasing Defendants' Sur-Reply at
5 footnotes 21, 36, 37, 38 and 39. Such citations do little to aid
6 the Court in assessing the parties' arguments. Finally, Leasing
7 Defendants improperly use attorney declarations to summarize
8 deposition testimony and make factual and legal arguments. See,
9 e.g., Nigro Dec. at ¶ 14. This is a clear violation of Civil
10 Local Rule 7-5(b) which provides, "An affidavit or declaration may
11 contain only facts, must conform as much as possible to the
12 requirements of Fed. R. Civ. P. 56(e), and must avoid conclusions
13 and argument."

14 The parties are reminded of their duty to abide by the Local
15 Rules.

16 CONCLUSION

17 For the foregoing reasons, the Court GRANTS in part
18 Plaintiffs' motion for class certification, to be appointed as
19 class representatives and to appoint their counsel as class
20 counsel. The Court certifies the following two classes:

- 21 (1) A California subclass of the proposed SKS Post-Lease
22 Expiration Class, which is defined as: "All persons and businesses
23 whose lease numbers appeared on Schedule 1" to pursue a UCL claim.
24 (2) The Property Tax Equipment Cost Basis Class, which is defined
25 as: "All persons and businesses who from March 26, 2006 to the
26 present paid any Leasing Defendants property taxes based on a cost
27 greater than the 'equipment cost'" to pursue a breach of contract
28

claim and its California subclass to pursue a claim for breach of
the duty of good faith and fair dealing and a UCL claim.

IT IS SO ORDERED.

Dated: 12/20/2013


CLAUDIA WILKEN
United States District Judge

United States District Court
For the Northern District of California